

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ISHMIAR G. DAVISON,

Defendant-Appellant.

UNPUBLISHED
February 28, 2003

No. 237230
Wayne Circuit Court
LC No. 00-008093-01

Before: Saad, P.J., and Zahra and Schuette, J.J.

PER CURIAM.

Following a jury trial, defendant was convicted of four counts of first-degree criminal sexual conduct, MCL 750.520b (victim under thirteen years of age). He was sentenced to four concurrent terms of five to ten years' imprisonment. He appeals as of right. We affirm.

Defendant's nine-year-old male cousin testified that defendant engaged in oral and anal sex with him on several occasions. Defendant denied the allegations, and asserted that the complainant learned about sex from exposure to explicit materials supplied by other family members.

I. Effective Assistance of Counsel

Defendant argues generally that he was denied the effective assistance of counsel in five ways: (1) counsel "failed to conduct effective pretrial discovery;" (2) counsel failed to "engage in substantive client consultation;" (3) counsel failed to object to inadmissible evidence; (4) counsel did not "present a substantial defense," including engaging in "timid" cross-examination of the complainant; and (5) counsel failed to call four witnesses who would have supported defendant's denial of the offenses.

The right to counsel is not violated unless counsel's performance fell below an objective standard of reasonableness and the defendant was so prejudiced that he was deprived of a fair trial. *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052, 2065; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). Prejudice is present when the court can conclude that there is a reasonable probability that the result of the proceeding would have been different – that is, the jury would have had a reasonable doubt about guilt. *Pickens*, *supra* at 312.

A. General Allegations of Ineffective Assistance

Although defendant conducted an evidentiary hearing in connection with a motion for new trial pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), he did not question trial counsel at the *Ginther* hearing about the first four allegations of ineffective assistance asserted on appeal. Accordingly, his argument on appeal necessarily relies on the existing trial record. *People v Juarez*, 158 Mich App 66, 73; 404 NW2d 222 (1987).

Defendant merely presents generalized allegations of ineffectiveness without identifying on the record the conduct that he claims was deficient, and he does not argue on appeal how his attorney should have handled the matters differently. Therefore, defendant has not shown that counsel was deficient in his handling of pretrial discovery. Further, he has not shown how much counsel consulted with him before trial or how it harmed his defense, he has not identified the evidence that counsel should have objected to or why counsel failed to object, and he has not identified how or why counsel should have conducted a more forceful cross-examination of the complaining witness.¹ Thus, defendant has failed to show that counsel was ineffective with regard to the first four allegations.

B. Failure to Call Witnesses

At the *Ginther* hearing, defendant examined trial counsel regarding only one of the grounds asserted here, the failure to call witnesses. Defendant claims on appeal that *four* people should have been called as witnesses, but there were no proofs about counsel's failure to call two of them (Anita Franklin and Lance Franklin).² Accordingly, we must presume that counsel's failure to call those two witnesses was a matter of trial strategy, *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

Turning to the sole allegation supported by proofs at the *Ginther* hearing, we find no error in trial counsel's decision to refrain from calling Sheree Johnson-Sledge and Karletha Gilliam as witnesses. Neither woman testified at the *Ginther* hearing, but their proposed testimony was summarized in affidavits prepared after defendant's conviction. Defendant's mother testified that she gave defense trial counsel copies of written statements from the two women months before trial and believed they would be called as witnesses.

In her affidavit, Sheree Johnson-Sledge, a family friend, stated that the complainant seemed "troubled." Upon further inquiry, she said that the complainant told her that defendant had not touched him sexually but that his grandmother kept telling complainant that he had been touched until the complainant relented and agreed with her. She also stated that the

¹ We note in passing that the manner of cross-examining a child witness is a matter of trial strategy, and it is not unusual to treat such witnesses gently to avoid giving the jury the unfavorable impression that the defense is bullying a child.

² Mr. and Mrs. Franklin did not testify at the *Ginther* hearing, and their proposed testimony was not preserved in sworn affidavits. Instead, in correspondence, they asserted that defendant had never molested their children (who were unconnected with the charges in this case).

complainant's mother continued to leave the complainant in defendant's care while charges were pending.

Maternal aunt Karletha Gilliam asserted that she received a phone call from her sister – the complainant's mother – in which the complainant's mother said that the complainant had accused defendant of forcing the complainant and Ms. Gilliam's son to have sex at gunpoint. She questioned the complainant, Ms. Gilliam stated, and the complainant repeated the allegation that defendant forced him to have oral and anal sex at gunpoint. The complainant then said that defendant did not perform the sex acts *because Ms. Gilliam's son told defendant to stop*.

Ms. Gilliam questioned her own child, and she said he denied that defendant had sex with him or that defendant put a gun to anyone's head. Ms. Gilliam also alleged that her mother (the complainant's grandmother) said that she was going to have the complainant's family sue defendant's family because the acts happened at their house. The grandmother also allegedly stated that defendant had sex with three other named children. The parent of one child told Ms. Gilliam that her child denied the accusation.

Trial counsel admitted receiving written witness statements, but he testified that they differed from the affidavits prepared after trial and presented for the first time as exhibits to defendant's motion for new trial. Trial counsel testified that he did not call Ms. Gilliam as a witness because he was concerned that her proposed testimony could create an impression that defendant had committed a series of sexual assaults against relatives and the family had been unable or unwilling to halt his behavior. He did not call Ms. Johnson-Sledge because he felt that he had adequately dealt with the allegation that the complainant had been encouraged to lie by his grandmother through cross-examination of the complainant.³ He also was concerned that it would appear that defendant's family was attempting, through friends, to persuade witnesses not to testify.⁴ The trial judge found that the statements would have been damaging to defendant's case.

Counsel testified that he consulted defendant about his decision not to call the witnesses and defendant agreed with the strategy. Defendant denied that he had been consulted.

Each witness had the potential to harm defendant's case. Evidence of other allegations that were "investigated" solely by family members could create the impression that defendant engaged in a lengthy series of sexual assaults upon children. Even if retracted, the allegation that defendant used a gun took the scenario to a more threatening level. Testimony that defendant only stopped performing sex acts because a child told him to stop would be devastating. Any implication that defendant's friends or family were attempting to persuade witnesses to testify could also be harmful to the defense. While defendant argues that his continued contact with the children demonstrates that no one considered him a threat, we believe this evidence could also be used to show that defendant violated the court's bond order, which prohibited contact with the

³ Counsel cross-examined the complainant about what his grandmother had told him.

⁴ Trial counsel testified at the *Ginther* hearing that, during trial, the prosecutor complained to the court that witnesses reported that defendant's family was attempting to get them to refrain from testifying.

complainant. Defendant has failed to overcome the presumption that the failure to call the witnesses was sound trial strategy. *People v Davis*, 250 Mich App 357, 368-369; 649 NW2d 94 (2002).

II. Pretrial Discovery Order

Defendant argues that the prosecutor violated MCL 767.40a when it failed to disclose that defendant had made a brief statement to the arresting officer, which was reduced to writing in the officer's preliminary complaint report ("PCR") and signed by defendant. MCL 767.40a requires the prosecutor to disclose the names of res gestae witnesses. The arresting officer's name was disclosed on the prosecutor's witness list dated April 4, 2001. We reject defendant's argument that MCL 767.40a required the prosecutor to supply the documents in question. The statute deals only with the disclosure of witnesses' names.

Defendant has not identified or quoted any court order compelling the production of documents, and our review of the lower court file fails to disclose such an order. The prosecutor stated at trial, however, that the document should have been turned over to defendant as "part of the discovery counsel received."

The trial court offered defendant an opportunity to conduct a *Walker* hearing⁵ to challenge the statement; defendant declined the offer. The prosecutor offered to produce the officer who took the statement so defense counsel could interview him. The court ruled that the written statement would not be admitted into evidence because "PCR's don't get admitted." The court allowed the officer to testify about the statement defendant made⁶ though, and defendant vigorously cross-examined the officer about the statement and its surrounding circumstances.

Even if we were to assume that there was a formal or informal discovery process in this case, we would find no error. The trial court's decision to allow evidence that should have been produced during pretrial discovery is reviewed for an abuse of discretion. *People v Johnson*, 206 Mich App 122, 126; 520 NW2d 672 (1994) (disclosure of exhibits on first day of trial); *People v Canter*, 197 Mich App 550, 563; 496 NW2d 336 (1992) (late endorsement of witness). The court here offered adequate procedures to prevent prejudice from any surprise evidence. *Canter*, *supra*. The court did not abuse its discretion.

Affirmed.

/s/ Henry William Saad
/s/ Brian K. Zahra
/s/ Bill Schuette

⁵ *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

⁶ Defendant denied making the statement and denied that his signature appeared twice on the PCR.